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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT VINCENT RODRIGUEZ,

Defendant and Appellant.

G046005

(Super. Ct. No. 11CF0529)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard W. Stanford, Jr., Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr. and Christopher P. Beesley, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Appellant Robert Vincent Rodriguez was convicted of carrying a loaded, unregistered firearm in public and of violating Penal Code section 186.22, subdivision (a),¹ part of California's anti-gang statute. He appeals only the second conviction, and only for insufficient evidence to support the first element of the crime: active participation in a criminal street gang. We affirm the conviction on that basis.

FACTS

Rodriguez was arrested on February 25, 2011. He was standing alone outside a Circle K convenience store at 9:30 p.m., at the corner of Warner and Fairview in Santa Ana, when a police officer and his partner on patrol stopped to talk to him. The officer and Rodriguez exchanged some small talk, and the officer noticed some tattoos on Rodriguez's neck and hands.² Rodriguez was wearing a dark coat and dark blue pants and shirt, which the officer described as "pretty baggy." The officer asked Rodriguez whether he was currently on probation or parole or had ever been arrested, and Rodriguez said no. The officer then asked Rodriguez whether he had anything on him. At first, Rodriguez said no, then he admitted to having a gun in his pocket. The officer's partner cuffed Rodriguez, and the officer retrieved the gun from Rodriguez's jacket. The gun was loaded and chambered. The officer asked Rodriguez if he belonged to a gang. Rodriguez at first denied gang membership, then replied he had been "kicking it" with the Delhi gang since he was 15 years old. Rodriguez was 19 at the time of his arrest. Rodriguez refused to say where he had obtained the gun, but he stated he was carrying it for protection because he was alone in a section of the city that was rival gang territory. The intersection where Rodriguez was arrested is on the border of a rival gang's territory. When asked whether he got along with the rival gang, Rodriguez expressed his disdain

¹ All further references are to the Penal Code unless otherwise indicated.

² One tattoo, the ace of spades, is specifically associated with the Delhi gang. The other two are generic gang tattoos, not associated with any particular gang.

for its members: “Fuck those fools.” The officer also asked Rodriguez about his tattoos, and Rodriguez replied that they represented his “hood.”

Rodriguez’s only other documented contacts with law enforcement occurred in 2007, when he was 15 years old. Rodriguez’s mother reported him missing in June 2007. She told police he associated with the Delhi gang and had a gang nickname, “Little Bobble.” Shortly afterwards, the police found Rodriguez and returned him to his mother. She reported him missing again the next day. In October 2007, Rodriguez was arrested for vandalism when he was caught spray painting over a rival gang’s graffiti in Delhi territory. He admitted to being part of the Delhi gang. At that time, he had only one gang tattoo, which was not specific to the Delhi gang.

As a result of his 2011 arrest, Rodriguez was charged with two offenses: carrying a loaded firearm (§ 12031, subd. (a)(1), now § 25850, subd. (a)); and actively participating in the Delhi gang to promote the gang’s felony criminal conduct (§ 188.22, subd. (a)). The loaded firearm violation was charged as a felony under section 12031, subdivision (a)(2)(F) (now § 25850, subd. (c)(6)), because the gun was unregistered.

At trial, the state’s gang expert witness gave it as his opinion that a hypothetical person who was present at 10:30 p.m. on the border of a rival gang’s territory with a loaded gun, who had tattoos and clothing like Rodriguez’s, who admitted that he had been “kicking it” with Delhi since age 15, who had a gang moniker, and who held an uncomplimentary opinion of the rival gang was a participant in the Delhi gang who was furthering, assisting, or promoting the gang’s criminal conduct by carrying a loaded gun. The gang expert testified that he had interviewed at least 1,000 gang members during his years as a Santa Ana police officer, including Delhi gang members. He had never met Rodriguez or met any gang member who had mentioned Rodriguez. Other than the vandalism case in 2007, the witness had discovered no field interview

cards or STEP notices³ for Rodriguez or any evidence of contact with the police since October 2007. The witness also acknowledged that Rodriguez's home address on the crime report was a block away from the Circle K store where he had been arrested.

The jury convicted Rodriguez on both counts – carrying a loaded, unregistered firearm and street terrorism as part of the Delhi gang.⁴ The court sentenced him to three years probation.

Rodriguez has appealed his conviction for street terrorism, asserting insufficient evidence of his active participation in a street gang as the sole issue on appeal.

DISCUSSION

In the face of a challenge to a verdict for insufficient evidence, “we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60.) We do not reweigh evidence. We assume the existence of every fact that could reasonably be deduced from the evidence to support the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar, supra*, 51 Cal.4th at p. 60.)

³ STEP stands for California’s Street Terrorism Enforcement and Prevention Act, sections 186.20 et seq. A STEP notice informs suspected individuals that law enforcement believes they associate with a criminal street gang.

⁴ During deliberations, the jury sent the court a written question: “How do we interperite [*sic*] or define ‘actively participated’[?] Does this mean only at the time of arrest . . . in Feb. 2011 or should we consider past arrest in 2007?” The court responded, “You may consider all the evidence including past arrest evidence, but the charge in Count 2 is that he ‘actively participated’ according to the definition in Instruction #1400 at the time of the arrest on 2/25/11.” Jury instruction 1400 states, “Active participation means involvement with a criminal street gang in a way that is more than passive or in name only. [¶] The People do not have to prove that the defendant devoted all or a substantial part of his . . . time or efforts to the gang, or that he was an actual member of the gang.”

Section 186.22, subdivision (a), provides “Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished” “The substantive offense defined in section 186.22(a) has three elements. Active participation in a criminal street gang, in the sense of participation that is more than nominal or passive, is the first element. . . .” (*People v. Lamas* (2007) 42 Cal.4th 516, 523; see also *People v. Castenada* (2000) 23 Cal.4th 743, 752.) Rodriguez has challenged only the “active participation” element of the crime for insufficient evidence.⁵

A person need not be an actual member of the gang in order to actively participate in it. (*In re Lincoln J.* (1990) 223 Cal.App.3d 322, 330, fn.4.) The participation must, however, take place at or reasonably near the time of the felonious criminal conduct the defendant is promoting, furthering, or assisting. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1509.)

Although the evidence of Rodriguez’s active participation in the Delhi gang in February 2011 was circumstantial, we conclude it sufficiently supported the jury’s decision. It was stipulated that Rodriguez joined the Delhi gang at age 15, a gang that included members of his immediate family, and he identified himself as a Delhi gang member in October 2007, when he was arrested for tagging on Delhi’s behalf. The question before the jury, then, was whether he was still actively participating three years and four months later.

When he was arrested, Rodriguez was standing across the street from the border of a rival gang’s territory with a loaded, unregistered gun. He wore Delhi gang colors (dark blue shirt) and gang attire (baggy clothes), and he sported several gang tattoos, one of which was specific to the Delhi gang and which he had acquired sometime

⁵ We therefore express no opinion about the sufficiency of the evidence of the other two elements.

after his arrest in 2007. He told the arresting officer he had been “kicking it” with the Delhi gang since he was 15 years old, and he expressed his contempt for the rival gang. He said he was carrying the gun for protection because he was living in a rival gang’s territory, a statement implying both acute awareness of territorial boundaries and the perception of other gangs as rivals or allies of Delhi. He also informed the officer that the tattoos represented his “hood,” that is, the Delhi territory.

There was, admittedly, countervailing evidence, most notably the lack of documented contact with law enforcement between October 2007 and February 2011. But that is what juries are for. The jury members focused on the “active participation” element of street terrorism, as demonstrated by the question they sent to the court during deliberations, asking for clarification of that element. The jury decided that Rodriguez was still actively participating in the Delhi street gang. Sufficient evidence supported that decision.

DISPOSITION

Rodriguez’s conviction for violation of section 186.22, subdivision (a), is affirmed.

BEDSWORTH, J.

WE CONCUR:

O’LEARY, P. J.

THOMPSON, J.